No. 14512

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED W. STEINER,
JOHN W. HADZIMA,
ROY PURSSELLEY,
NICHOLAS SPICUZZA,
OLIVE SPICUZZA,
GEORGE TODD
and CHARLES WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee,

APPELLANTS' OPENING BRIEF

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No. 14512

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED STEINER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

Statement of Facts

Appellants were indicted for conspiracy to violate Section 545 of Title 18, United States Code, and also on ten substantive counts charging violations of Section 545. (T 3-20)

The pertinent part of Section 545 of Title 18, United States Code reads:

> "545. Smuggling goods into the United States.--Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which

should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law--

Shall be fined not more than $5,000.00 or imprisoned not more than two years, or both.

(62 Stat. 716, 18 U.S.C. 545)

On September 2, 1953, a motion to dismiss the indictments was argued and denied (T 79, 95-117).

Appellants were brought to trial. The trial court dismissed counts 2 to 7 inclusive of the substantive counts. The jury rendered a verdict finding all of the appellants guilty of conspiracy under count 1. Appellants, Steiner, Hadzima, Nicholas Spicuzza, Pursselley, and Todd were found guilty on all four of the remaining substantive counts. Appellant, Olive Spicuzza, was found guilty on counts 8 and 9 of the substantive counts. Appellant, Walker was found guilty on counts 10 and 11 of the substantive counts.

Defendants filed a motion for new trial (T 20). Said motion was denied (T 64).

Notice of appeal was filed (T 76). Subsequently a designation of points on appeal was filed (T 748).

Appellant John Hadzima has substituted a separate counsel to represent him on appeal. Therefore, this brief is submitted on behalf of John Hadzima.

Jurisdiction of the District Court

The trial court had the jurisdiction to try the alleged offenses charged in the indictment.

> "--- The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."
> (62 Stat. 826, 18 U.S.C. 3231)

Appellants deny the indictments were sufficient to state an offense against the United States.

Failure of the indictment to state an offense voids the verdict of the jury and sentence and judgment of the district court. It does not effect the power of the district court. Therefore, the district court had jurisdiction to hear the case.

Jurisdiction of the Appellate Court

Section 1291 of Title 28 of the United States Code vests appellate jurisdiction in the courts of appeals of all final decisions of the district courts of

the United States.

The indictments (T 3 et. seq.) constitute the pleadings necessary to prove jurisdiction and venue in the district court hearing the matter.

Questions Involved on Appeal

The issues presented by this appeal are:

1). May appellants be charged in the indictment and convicted of felonies under a general law when the particular acts charged are misdemeanors under a specific law?

2). May appellants be convicted of felonies based on an indictment which charges appellants committed particular acts "contrary to law" without stating the specific law appellants' acts contravened?

3). Does the term "merchandise", as used in Section 545, Title 18, United States Code, include birds of the psittacine family?

4). Is it error for the trial court to refuse to compel the prosecution to elect which substantive offense, upon which they had offered evidence, they relied upon to prove the specific charges in the counts of the indictment?

5). Were the appellants prejudiced and deprived of a fair trial by the fact that a juror discussed the case with a witness subpoenaed by the government outside the courtroom during the course of the trial?

Manner in which Questions on Appeal were Raised

The question of charging a felony when the act was a misdemeanor under a specific law was raised in a motion to dismiss the indictment for failure to state an offense under 18 U.S. Code 545(T95 et seq.). The questions of failure of the indictment to state the specific law violated by appellants' acts was raised in the same motion attacking the sufficiency of the indictment.

The question of whether the word "merchandise" includes Psittacine birds was raised in said motion.

The question of electing the substantive offenses relied on to prove the counts was raised as an alternative motion to the motion to dismiss the substantive counts on October 15, 1953 (T 35).

The question of misconduct of a juror depriving appellants of a fair trial was raised in the motion for a new trial (T 20).

Statement of the Case

Appellants were convicted of conspiracy to violate Section 545 of Title 18, United States Code.

Subsequent to the jury's verdict, one of the counsel for appellant received information of misconduct by a juror. Affidavits alleging said misconduct were filed and motion for a new trial submitted. The trial court determined the misconduct was not prejudicial. Appellants contend

this ruling of the court was in abuse of its discretion and prejudicial error.

Both before and after trial the court refused to dismiss the indictment and ruled that the indictment sufficiently stated the offenses charged therein. The court concluded that regulations of an executive department, issued pursuant to authority granted by statute, were not of equal dignity with the statute allegedly violated by appellants. Therefore, the court reasoned that the rule that one cannot be punished under a general law when his act is punishable under a specific law was not applicable. Appellants contend the conclusion of the court was erroneous and prejudicial i.e. the general statute under which they were prosecuted is a felony while the specific law violated by their alleged acts makes said acts misdemeanors.

The trial court held the Government does not have to elect which substantive counts, it has offered evidence on, upon which it relies to prove the offenses charged. Appellants contend failure to grant their motion to compel an election is prejudicial error. This is so, for without an election, some jurors may rely on certain evidence to prove a specific count, other jurors on other evidence to prove the same count; resulting in an apparently unanimous verdict based on different evidence.

The court ruled that the indictment stated a sufficient offense. Appellants contend this is error in that the term "contrary to law" without stating the particular law, is too vague and uncertain to state an offense.

Appellants' Specification of Errors

The following errors of law in the district court are specified by appellants as grounds for reversal.

1). Conviction and sentencing of appellants under the provisions of Section 545 of Title 18, United States Code, when the offenses charged were punishable as misdemeanors under a specific law, i.e. Section 271 of Title 42, United States Code; Sections 42 and 43 of Title 18, United States Code.

2). Conviction of appellants of offenses set out in an indictment charging only the commission of acts "contrary to law" without stating the specific law violated.

3). Conviction of appellants for importing, transporting and receiving psittacine birds contrary to Section 545 of Title 18, United States Code when said psittacine birds are not "merchandise" within the meaning of the word as used in 18 U.S.C. 545.

4). The district court's denial of appellants' motion to compel the Government to elect the substantive offenses, on which evidence was offered, on which they relied to prove the specific charges set out in the indictment's substantive counts.

5). Refusal of the district court to grant appellant's motion for new trial when a juror was guilty of misconduct prejudicial to appellants.

ARGUMENT

I

APPELLANTS WERE ERRONEOUSLY CONVICTED OF VIOLATING A GENERAL LAW, WHEN A SPECIFIC LAW CONTROLLED.

III

THE TERM "MERCHANDISE", AS USED IN SECTION 545, TITLE 18, UNITED STATES CODE, DOES NOT INCLUDE BIRDS OF THE PSITTACINE FAMILY, AND THEREFORE THE INDICTMENT DOES NOT STATE ANY OFFENSE UNDER SECTION 545, TITLE 18, UNITED STATES CODE, OR THE OFFENSE OF CONSPIRACY TO VIOLATE SAID SECTION.

Appellants were charged with conspiracy to violate both paragraphs of Section 545, Title 18, U.S. Code in Count I of the indictment (T 2-14) alleging the importation of Psittacine birds which should have been invoiced; importation of psittacine birds contrary to law; and the concealing and transporting of psittacine birds which had been imported contrary to law. Four substantive counts, VIII, IX, X, and XI, charged appellants with violating Section 545, Title 18, U.S. Code, that of importation, and with receiving and concealing after importation, psittacine birds.

Title 18, U.S. Code, Section 545 is a general statute and deals with any merchandise. However, it generally follows that where a specific statute deals with a "specified article", that article is no longer merchandise within the provisions of Section 545,

Title 18 U.S. Code, the specific law controlling the general law, and this being the case where Congress so intended. Palmero v. U.S., 112 F. 2d 922 (1st Cir. 1940), U.S. v. Mueller, 178 F. 2d 593 (5th Cir. 1950).

With respect to Psittacine birds, Section 264 Title 42, U.S. Code authorizes the Surgeon General to pass regulations to prevent introduction of communicable diseases into the United States. The regulation passed by the Surgeon General (Sec. 71.152 (b) of Title 42 U.S. Code Fed. Regs.) states in part "... Psittacine birds shall not be brought into the continental United States."

The question whether such regulation affected the general statute of which the defendant was charged, that of violating Section 545 Title 18 U.S. Code, was before this Circuit in somewhat a similar matter in the Murray v. U.S. Case, 217 F. 2d 583 (9th Cir. 1954).

However, in the Murray Case, the question of whether Sections 42 and 43 of Title 18 U.S. Code, apparently was not before this Circuit Court. And in this case appellants have always contended that the specific controls the general.

Sections 42 and 43 of Title 18 U.S. Code being statutes and not regulations, deal with animals and birds. Section 42 Title 18 U.S. Code states in part "... Nothing in this sub-section shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots, or such other birds as the

Secretary of the Interior may designate. "The violation of this section subjects one to a fine of not more than $500.00 or imprisonment of six months, or both. This section was last amended May 24, 1949, c 139 Sec. 2, 63 Stat. 89.

Section 43 Title 18 U.S. Code states in part "Whoever transports, brings, or conveys,from any foreign country into the United States any wild animal or bird,... contrary to the law of such foreign country ...etc.; or whoever, knowingly purchases or receives any wild animal or bird...from any foreign country... in violation of this section...etc.; or whoever, having purchased or received any wild animal or bird,...etc., imported from any foreign country or shipped, transported, or carried in interstate commerce...etc." This section was passed June 25, 1948, c 645, 62 Stat. 687.

It was, no doubt, the intent of Congress to deal with birds and animals separate and apart from any and all merchandise which might be included in Section 545 of Title 18 U.S. Code. To hold otherwise would render Sections 42 and 43, Title 18 U.S. Code meaningless, since if birds are merchandise under Section 545, there would be no need for the specific statutes herein referred to.

It will be noted that the punishment provided for by Sections 42 and 43, Title 18 U.S. Code is that of a misdemeanor, and that Section 371 of Title 18 U.S. Code provides that the punishment for a conspiracy to commit a misdemeanor shall not exceed the maximum punishment provided for such misdemeanor.

With reference to the bringing in of the birds, the charges against appellants under Section 545 of Title 18 U.S. Code; in the U.S. v. Yuginovich Case, 256 U.S. 450, 41 S. Ct. 55, 65 L. Ed. 1043 (1920), it was there held that Congress must have intended to repeal the internal revenue laws in so far as they verbally or literally required performance of acts prohibited as crimes. And in the U.S. v. Reed Case, 274 Fed. 724 (D.C.N.Y. 1921), that Congress could not have intended to require the Captain of the vessel to make a report to the effect that he was committing a crime against the laws of the United States, in order to avoid liability for a penalty not expressly defined, but only forced out of language which, taken literally, is not broad enough to justify such interpretation.

In this case, we have the identical situation in which it could not have been expected of appellants to have made a report to the effect that they were committing a crime against the laws of the United States, when bringing in such birds specifically prohibited by the Surgeon General's regulation and Sections 42 and 43 of Title 18 U.S. Code.

II

THE INDICTMENT DID NOT STATE A PUNISHABLE OFFENSE IN ALLEGING ONLY THAT ACTS CHARGED WERE CONTRARY TO LAW.

In the indictment, counts VIII, IX, X, and XI, alleged various acts of the appellants to be "contrary to law". The counts follow 18 U.S. Code 545. No law is specified in said counts to have been contravened. Such indictment is fatally defective; and states no offense.

An indictment or information in the language of a statute ordinarily is sufficient, except where the words of the statute do not contain all the essential elements of the offense. If the statute omits an essential element, the indictment must supply it with certainty. Babb v. U.S., 218 F. 2d 538 (5th Cir. 1955).

Section 545 of Title 18 U.S. Code defines two separate types of offenses: That of smuggling or clandestinely introducing merchandise which should have been invoiced and that of importing or bringing in merchandise "contrary to law". There is a great difference between smuggling and importing, bringing in or receiving etc., since the first manifestly is unlawful per se, while importing, bringing in, receiving, etc., after importation is not. Babb v. U.S.

In this case the appellants in substantive counts VIII, IX, X, and XI, of the indictment (the remaining counts) were charged with having committed violations under the second distinct paragraph of the statute. The indictment in those counts

charged appellants with importing, and with receiving etc., after importation, merchandise, to-wit, birds, "contrary to law". The conspiracy count, parts One and Two (Tp4 & 5) likewise recites similar language and does not refer to some law chargeable against the appellants but states too that the acts committed by appellants as therein alleged were done "contrary to law". Contrary to what law therefore was not distinctly specified.

The Keck v. U.S. Case, 172 U.S. 434, 19 S.Ct. 254, 255, 43 L.Ed. 505, (1898), charged defendant with importing diamonds "contrary to law"; the indictment being there found fatally defective. It was held that the expression import and bring into the United States was vague and did not convey the necessary information to the defendant.

The Babb Case likewise held that the indictment should have alleged some fact or facts showing that the cattle were brought in contrary to some law; that it was not enough to say that they were imported or brought in "contrary to law".

The indictment here, in counts VIII, IX, X, and XI, does no more than that. It was asked to be dismissed. (Tp 95)

Accordingly it is respectfully urged that counts VIII, IX, X, and XI, failed to allege an offense against appellants and should be set aside.

IV

THE COURT FAILED TO COMPEL THE GOVERNMENT TO ELECT WHICH OF THE MANY SUBSTANTIVE OFFENSES UPON WHICH EVIDENCE HAD BEEN OFFERED THEY RELIED UPON TO PROVE THE SPECIFIC CHARGES IN ALL OF THE COUNTS OF THE INDICTMENT.

Counts VIII, IX, X, and XI, in the indictment charged offenses on April 3, 1952, and September 22, 1952. Count I of the indictment charged a conspiracy to commit three unlawful acts; that of, conspiracy to import Psittacine birds which should have been invoiced, conspiracy to import Psittacine birds contrary to law, and conspiracy to conceal and transport Psittacine birds which had been imported contrary to law.

In the course of the trial many witnesses testified. The testimony covered many different periods of time; and covered many transactions allegedly engaged in by the appellants. Appellants included a large amount of this testimony in the record. The purpose was to show the many offenses on which the Government introduced testimony.

After the Government concluded its case, appellants made their motion compelling the Government to elect the offenses they chose to rely in proof of the substantive counts or count. It was as follows:

> "...I will make a sole motion at this time to compel the Government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned." (T 35)

The trial judge felt that this motion was not clearly shown to be one demanding an election. The trial judge concluded however, that since the motion was made after the Government rested, it came too late (T 36).

This was undoubtedly prejudicial to the appellants. The presentation of their defense was thereafter difficult.

It was also prejudicial in that different jurors could rely on different offenses to sustain their verdict of guilty on the substantive counts.

The motion was not made too late.

In Peckham v. U. S., 210 F. 2d 693, 697, (D. C. 1953) where after a motion to compel the Government to elect upon which counts it would proceed, being overruled, it thereafter develops to be prejudicial and is not cured by requiring an election or by other relief, material error would afflict the trial, (citing Dunaway v. U. S., 205 F. 2d 23, 24).

In Finnegan v. U. S., 204 F. 2d 105, 109, (8th Cir. 1953) (1-3) "If, however, the defendant felt that the testimony was such as to prejudice him in this regard he should have renewed his motion either at the close of the Government's evidence or at the close of the entire case. We have held that it may properly be interposed at the close of all the evidence." (Citing Bedell v. U. S. (8th Cir.) 78 F. 2d 358).

V

THE APPELLANTS WERE SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE FACT THAT A JUROR COMMITTED MISCONDUCT BY DISCUSSING THE CASE WITH A WITNESS SUBPOENAED BY THE GOVERNMENT OUTSIDE THE COURTROOM DURING THE COURSE OF THE TRIAL.

The appellants filed a motion for a new trial; one of the grounds specified was misconduct by a juror. The trial court interrogated the juror and the Government witness who contacted the juror; they were examined under oath (T 698 et seq.).

The evidence thus adduced showed that the said Government witness was with the juror twice; they spent considerable time together (T 717). Both the juror Gloria Miller and the witness admitted that they discussed the case somewhat (T 699-746). All of these events took place during the course of the trial and outside the presence of the court.

The trial court in the exercise of his discretion found that the appellants were not prejudiced thereby. The opinion of the trial court is reviewable.

In the Mattox v. U.S. Case, 146 U.S. 140, 13 S. Ct. 50, 36L. Ed. 917 (1892) at page 50, the court said: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear. This portion of the Mattox Case was followed by this Circuit in the Cavness v. U.S. Case, 187 F. 2d 719, (9th

Cir. 1951), at 723. The question is one of prejudice; a matter for determination. And as was said in U.S. v. Rakes, 74 Fed. Supp. 645 (D. C. Va. 1947), 648: "the action of the court in such case as this depends upon the particular facts." However, in the Cavness Case it was said: page 723, "unless as a matter of policy prejudice must be conclusively presumed, as where the irregularity 'has tainted the panel...'".

In Stone v. U.S., 113 F. 2d 70 (6th Cir. 1940) 77, the court said: "The courts have exercised some discretionary power in dealing with the conduct of juries...and have not always disturbed verdicts for misconduct...(Klose v. U.S. 8th Cir. 49 F. 2d 177) but when jurors have communications with strangers, the case is different and cannot be dealt with so easily." And further said: "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained."

The question is not whether any actual wrong resulted from the conversations of Heffner, the Government witness, with the juror Miller, but whether it created a condition from which prejudice might arise, and unconscious opinion might be formed, or from which the general public would suspect that the jury might be influenced.

With regard to the jury panel itself, it is interesting to note that no questions were asked of juror Miller whether she imparted any of the information received from witness Heffner, to the jury, consciously (while the jury was deliberating) or unconsciously (while with the jury). It would have the effect of tainting the panel; be conclusively prejudicial

The irregularity undoubtedly left its mark on juror Miller; was an intrusion affecting the unbiased judgement of juror Miller, admittedly or not. It prevented her from thinking of, or expressing, acquittal for the defendants on fear of exposure; and is obviously a matter which would be denied by her. There was ample evidence from which prejudice could be ascertained. (T 698 et seq.)

The conduct of this juror and its effect on the jury was prejudicial to appellants and prevented them from having a fair trial.

VI

CONCLUSION

The appellants specify five separate grounds for reversal of their convictions and urge that the same be set aside. The errors specified are prejudicial to appellants and prevented them from having a fair trial.

It is therefore respectfully submitted that this Honorable Court set aside the convictions of all appellants on all counts and determine that the entire matter be reversed.

Respectfully submitted,

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